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IN THE

Supreme Court of the United States

October Term, 1978

Nos. 78-1088 and 78-1217

HENRY A. KISSINGER,

Petitioner,

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Respondents.

and

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Petitioners,

v.

HENRY A. KISSINGER,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER AND CROSS-RESPONDENT HENRY A. KISSINGER

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BRIEF FOR PETITIONER AND CROSS-RESPONDENT HENRY A. KISSINGER

OPINIONS BELOW

The *per curiam* judgment of the Court of Appeals and an accompanying memorandum (Pet. App. [1] 47a-50a) are not reported. The opinion of the District Court (Pet. App. 51a-58a) is reported at 442 F. Supp. 383; not reported are its orders of January 25, 1978 (Pet. App. 59a-61a), and March 2, 1978 (Pet. App. 63a-64a).

[1] "Pet. App." denotes the Appendix to the Petition for a Writ of Certiorari filed in No. 78-1088.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1978. The petitions for writs of certiorari were filed in No. 78-1088 on January 8, 1979, and in No. 78-1217 on February 5, 1979. The petitions were granted, and the cases were ordered consolidated, on April 16, 1979. The jurisdiction of this Court is based upon 28 U.S.C. §1254(1).[2]

QUESTIONS PRESENTED

1. Does the Freedom of Information Act apply to written materials which are not, and never were, in the custody or control of an agency? (Nos. 78-1088 and 78-1217).

2. Are rough notes made of petitioner Kissinger's telephone conversations when he was Secretary of State, which were never incorporated in the official files of the Department of State or claimed by it as its records, "agency records" subject to disclosure under the Freedom of Information Act? (No. 78-1088).

3. Is it constitutionally permissible to authorize Executive Branch employees to possess, read and retain the

[2]Dr. Kissinger is the petitioner in No. 78-1088. The respondents in that case are (a) the Reporters Committee for Freedom of the Press, the American Historical Association, the American Political Science Association, James MacGregor Burns, Nat Hentoff, Donald G. Herzberg, William Leuchtenburg, Arthur Link, and William Safire (the "RCFP requesters"); (b) the Military Audit Project and Felice D. Cohen (the "MAP requesters"); and (c) the Department of State, its Secretary, Cyrus R. Vance, the Librarian of Congress, Daniel J. Boorstin, and the Archivist of the United States, James B. Rhoads (the "federal respondents"). The RCFP requesters are cross-petitioners in No. 78-1217; all other parties are respondents in that case. The RCFP and MAP requesters are sometimes referred to collectively as the "requesters" or the "private respondents"; the RCFP requesters are also referred to as "cross-petitioners" in discussion of the issues presented by No. 78-1217.

notes of petitioner Kissinger's telephone conversations, when these notes were made in the legitimate expectation that they would not be treated as official records and when they reflect thoughts, opinions, beliefs and personal details which have no place in official records? (No. 78-1088 and, by implication, No. 78-1217).

4. Are rough notes made of respondent Kissinger's telephone conversations when he was Assistant to the President for National Security Affairs, which were never incorporated in the official files of any agency or claimed by any agency as its records, "agency records" subject to disclosure under the Freedom of Information Act? (No. 78-1217).

STATUTES AND REGULATIONS

The relevant portions of the Freedom of Information Act ("FOIA"), 5 U.S.C.§552 (Pet. App. 1a-10a); the Privacy Act, 5 U.S.C. §552a (Pet. App. 11a-16a); the Federal Records Act ("FRA") and related laws, 44 U.S.C. Chapters 21, 29, 31 and 33 (Pet. App. 17a-28a); the Federal Property Management Regulations, 41 C.F.R. Part 101-11 (Pet. App. 29a-34a); and the Foreign Affairs Manual of the Department of State, 5 FAM Part 400 (Pet. App. 35a-46a); are reproduced in the Appendix filed with the Petition in No. 78-1088.

STATEMENT OF THE CASE

A. Facts[3]

The Telephone Notes

The typed materials at issue in this case came into being as the result of monitoring, a common practice in which a

[3]Most of the facts appear in an uncontroverted affidavit which Dr. Kissinger filed in the District Court. A. 244a. The remaining facts appear in various public documents which were introduced as exhibits to the pleadings.

third party listens to and takes notes of a government official's telephone conversations. This procedure has been used for decades by senior government officials to assist in the internal management of their offices. The notes serve as a rough log or daily diary to which the official and his immediate staff can refer in carrying out the ongoing work of the office. This work includes the production of correspondence, memoranda and other formal documents which are filed as official records of the agency. The notes are not filed, because they are preliminary working papers that have no official significance after the records are created.[4]

These procedures were followed in Dr. Kissinger's case. During his years in government,[5] a secretary generally listened to and took notes of Dr. Kissinger's telephone conversations. This was done as a matter of internal routine to ease the administrative burdens of the office. Dr. Kissinger's Executive Secretary checked the notes periodically to make up his appointments calendar; his Senior Special Assistant read them to keep abreast of his activities in order to know whether any matters discussed by telephone required follow-up or implementation. The notes had no other purpose. A.244a-45a. They were not intended to be, or treated as, official records of Dr. Kissinger's oral commitments and decisions; the official records were the formal documents that were produced, circulated and filed in the ordinary course of business as part

[4]Notes, drafts, preliminary worksheets and similar papers fall within a general class of informal documents known as "non-record materials." *See* pp. 33-39, *infra*. Such materials need not and, indeed, must not be filed as records. 41 C.F.R. §101-11.401-3(d).

[5]Dr. Kissinger served at the White House as Assistant to the President for National Security Affairs from January 20, 1968, until November 3, 1975. He became Secretary of State on September 22, 1973, and continued in that position until January 20, 1977. A. 244a.

of the follow-up process.[6]

When Dr. Kissinger was at the White House, the notes of his telephone conversations were kept in his office with his other personal papers in separate files marked "personal." A. 247a. When he became Secretary of State, these personal files were physically removed to his new office for storage. As at the White House, these notes and the additional notes subsequently generated in the State Department office were kept in separate personal files. They were never circulated outside Dr. Kissinger's office, never intermingled with the State Department's official records, and never seen by anyone other than Dr. Kissinger's immediate aides. A. 245a-46a. This treatment was consistent with Dr. Kissinger's understanding that the notes were "work aids which I could retain or discard as I chose as had several of my predecessors and many other officials." A. 245a.

Because the notes were not designed to serve as official records, no effort was made to restrict monitoring to purely business calls. The notes therefore reflect official and non-official and private conversations.[7] Nor were the notes edited

[6]The official records of Dr. Kissinger's oral transactions are voluminous. One of the FOIA requests filed in this case asked for all "memoranda, aide memoirs, memoranda of conversations . . . or other written" records of conversations "conducted by Mr. Kissinger in his capacity as Secretary of State . . . ." A. 71a. The Department denied this request as overly broad, stating that it

> apparently includes aide memoires, diplomatic notes, memoranda of meetings, memoranda of telephone conversations, and correspondence between the former Secretary and persons both within and without the Department of State — a very large and undifferentiated volume of material. A. 79a.

[7]The requesters argued below, and the District Court found, that the notes necessarily related solely to official matters because State Depart-

for accuracy and completeness or to remove personal and other irrelevant matters. There was no need for this. Those who had access to them — Dr. Kissinger and his closest aides — already knew the substance of the conversations and could obtain the limited information they needed from the unedited materials. A. 245a-46a.

Had Dr. Kissinger known the notes might be viewed as official records, he would have been obliged to put them in proper form for filing.[8] Since he had no duty to create a record of every statement he made over the telephone during his tenure as Secretary of State, he would probably have chosen to discontinue the note-taking altogether rather than undertake this arduous and time-consuming task. A. 246a.

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ment policy prohibited monitoring except when " 'absolutely essential to the conduct of business.' " Pet. App. 56a. This conclusion is based on an inexplicable misreading of a letter from the Department's Acting Assistant Secretary for Congressional Relations to former Congresswoman Bella Abzug. In fact, the letter explicitly states that the general prohibition is subject to an exception which permits "a third party to listen to the telephone conversations of the senior principal officers of the Department for the purpose of taking notes or making appointments and to improve the general efficiency of operations." A. 122a-23a.

[8]Dr. Kissinger's affidavit makes clear that, while some of the notes are substantially verbatim,

> many others are only rough approximations of what was said [containing] misspelled names, omissions, garbled passages, and outright errors of transcription. Although the notes are useful in refreshing my recollections of particular conversations in which I participated, I do not believe they could be regarded as accurate records of my conversations unless they were first corrected and placed in proper form for filing as records. A.249a.

See also 148a-49a, 169a.

The Donation

Near the end of his term, Dr. Kissinger decided to donate papers relating to his career in public life to the United States. He chose the Library of Congress as depository because it already had an extensive collection of papers donated by previous Secretaries of State. A. 246a.

The donation included personal materials collected during Dr. Kissinger's years at Harvard, copies of official documents on which he had worked, and the contents of personal files he had accumulated while in government. To donate the papers relating to his activities as Secretary of State, he had to comply with State Department security regulations and other rules applicable to removal of papers by retiring officials. This he did. A. 246a-49a.[9]

As part of this process, Dr. Kissinger sought and received a written opinion of the Department's Legal Adviser concerning the status of the telephone notes. This opinion confirmed previous oral advice that the notes were not State

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[9]The steps taken to comply with these rules are described in a Donation Procedures Memorandum prepared by the Department's Deputy Undersecretary for Management and initialed by the Legal Adviser, the Assistant Secretary for Administration and the Director of the Foreign Affairs Document and Reference Center. A. 251a-54a. This memorandum sets forth procedures for review by the Department's records officers of Dr. Kissinger's working files to assure that no original records would be inadvertently removed when these files were transferred to the Library of Congress. It also states that, under the Department's rules, papers which had been expressly designated and filed as personal from the time of their origin or receipt could be delivered to the Library of Congress without review. A. 252a. This position is consistent with the Department's view that papers which are clearly designated as "personal" and kept separate from other files are "presumed to be papers in which the individual has the dominant interest — and thus may retain." A. 204a. Each of the persons who signed the memorandum knew that the telephone notes met this description. A. 260a.

Department records.[10] However, as a precaution to assure completeness of the Department's records, the Legal Adviser recommended that the notes be reviewed and extracts made of any discussion of a significant government activity or decision not otherwise reflected in the official files. A. 82a. This, too, was done; the extracts were then delivered to the Department and are presently filed there with the other records of Dr. Kissinger's service as Secretary. A. 248a.

The donation was made in November and December 1976, [11] pursuant to deed of gift agreements signed by Dr. Kissinger and the Librarian of Congress. The donation agreements restrict access to most of the collection for a term of years. A. 43a. Since the telephone notes implicate not only Dr. Kissinger's privacy but also the privacy of those with whom he spoke, the agreements provide that after the initial term expires notes relating to particular conversations may be released only with the consents of those who participated in the conversations. A.46a.

B. Proceedings Below

After the donation was completed and publicly announced, the private respondents filed FOIA requests with

[10]The oral advice was first given in January 1976, when the State Department rejected an FOIA request for a portion of the notes on the ground that the requested documents were not agency records subject to the Act. A. 173a. This advice was repeated on a number of occasions thereafter. A. 247a, 259a-60a, and reduced to writing in a formal legal opinion delivered on November 11, 1976. A. 80a.

[11]The telephone notes had been stored in separate personal files located in Dr. Kissinger's State Department office until October 29, 1976, when, in preparation for his retirement, they were removed and placed for safekeeping in a bank-type vault at the Pocantico Hills, New York, estate of then Vice-President Rockefeller. A. 247a-48a. They were delivered directly from this location to the Library on December 28, 1976. A.249a.

the State Department seeking access to the notes.[12] The Department denied the requests on two grounds: *first*, that the notes were not "agency records" subject to FOIA and, *second*, that the documents were not in any event within its custody or control. A. 61a, 73a, 78a. Following denial of their requests, respondents brought separate suits — later consolidated — against the Librarian of Congress and Dr. Kissinger as well as the State Department.

On cross-motions for summary judgment filed by respondents and by Dr. Kissinger, the District Court held that the notes made of Dr. Kissinger's conversations when he was Secretary of State were State Department agency records which must be returned to its custody. Pet. App. 58a. It declined, however, to reach the same conclusion with respect to the notes made when Dr. Kissinger was a Presidential Assistant, and rendered summary judgment in his favor on this issue. Pet. App. 59a-60a. Since the State Department period notes had never previously been part of the Department's record system, the District Court's order directed the Department to take possession of them, to read them to determine which portions are subject to FOIA disclosure and, thereafter, to release all non-exempt portions to the requesters. Pet. App. 60a-61a.

On cross-appeals by Dr. Kissinger and the RCFP respondents, the Court of Appeals affirmed. In a memorandum accompanying its *per curiam* order, the court stated it was in "full agreement on all issues with the opinion of the District Court . . . and its orders issued pursuant thereto . . . ." Pet. App. 49a. It also stated that the District Court had properly rejected the RCFP claim to the White House period notes because

> (1) The Freedom of Information Act does not extend to those of the President's advisors who are

[12]The MAP requests were filed on December 28 and 29, 1976. A. 69a, 71a. The RCFP request was filed on January 13, 1977. A. 56a.

so close to him as to be within the White House rather than the Executive Office of the President. (2) The mere relocation of these documents to the State Department without any indication that they were used by that agency does not render them State Department records obtainable via an FOIA request to that department. (3) The speculation that some of these earlier transcripts concerned the affairs of the National Security Council adds nothing to plaintiffs' claim because no FOIA request was made of the Security Council and, as mentioned above, the transfer of the notes to the State Department does not change their character. Pet. App. 49a-50a. (citations omitted).[13]

SUMMARY OF ARGUMENT

1. At issue in this case are rough notes made of Dr. Kissinger's telephone conversations when he was Assistant to the President for National Security Affairs and, later, Secretary of State. These telephone notes were part of a collection of materials and documents which Dr. Kissinger donated to the Library of Congress, as custodian for the United States, when he retired from public office. After the notes had been transferred to the Library, the private respondents filed FOIA requests with the Department of State seeking access to them. The Department denied their requests; they then sued it under FOIA to contest the denial. In this suit they joined Dr. Kissinger and the Librarian of Congress and asked for an order directing them to transfer the notes to the State Department.

The District Court granted that relief on the theory that

[13]This Court stayed the District Court's order pending a decision on the merits in the Court of Appeals. The Court of Appeals has stayed issuance of its mandate pending this Court's decision of the case.

Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1 (1975), authorizes declaratory and injunctive relief against persons who are not "agencies" when this is necessary to the enforcement of FOIA. That theory conflicts with the language of the Act. FOIA authorizes courts to order agencies to cease "withholding" records they are obliged to produce; it does not authorize courts to order agencies to procure documents they do not have, or to direct third parties to deliver documents to agencies so agencies can respond to requesters. Nothing in *Bannercraft* suggests that a court may create equitable remedies to cure what otherwise would be a lack of subject matter jurisdiction; the court should have dismissed requesters' suits for failure to state a claim on which relief could be granted.

2. Since the court lacked subject matter jurisdiction, there was no need for it to decide whether the notes made when Dr. Kissinger was Secretary of State were State Department agency records. In any event, the notes are not "agency records." They are rough memoranda, used only as work aids. They reflect personal conversations, thoughts, opinions, and beliefs which have no place in official records. They were never filed or used as official records, but were always kept separately in Dr. Kissinger's personal files. The State Department's regulations, like those of other agencies, classify such papers as non-record materials which an employee may retain or discard as he chooses.

Here the State Department specifically determined — both before and after the donation — that under its rules the notes were not "records." The courts below chose to ignore the Department's application and interpretation of its rules, and found instead that the notes are records because the Department had a common law right to own and possess them. This was error. Common law ownership concepts are inapplicable when the issue is whether documents are "agency records". The Department's conclusion that the notes were not its records was neither ar-

bitrary nor capricious nor an abuse of discretion nor was it contrary to law. The District Court's unexplained refusal to accept that conclusion was error.

3. The order below is unconstitutional. Although the District Court found the notes were "personal in some respects," Pet. App. 58a, it nonetheless directed the State Department to take possession of and read them all. None — regardless of content — is to be returned. Requesters have argued that *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), provides support for the privacy invasion which this extraordinary procedure contemplates. If *Nixon* was, indeed, the inspiration for the order, we believe the courts below seriously misapplied it. If *Nixon* does not support the order, there is no decision of this or any other court which could possibly justify it.

4. Cross-petitioners contend that the conclusion reached below as to the State Department period notes should also apply to the notes made when Dr. Kissinger was a Presidential Assistant. That argument fails if this Court resolves either of the first two issues in Dr. Kissinger's favor, but it cannot in any event succeed. Under no theory could the notes of Dr. Kissinger's conversations as a Presidential Assistant be "agency records" of the Department of State. Cross-petitioners' attempts to avoid this fundamental fact — first by arguing that the White House period notes became State Department agency records because they were once stored there in Dr. Kissinger's private files, and then by speculating that some of the notes may be agency records of the National Security Council — are unsupported by evidence and, accordingly, must be rejected.

ARGUMENT

I. THE REQUESTERS' COMPLAINTS SHOULD HAVE BEEN DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION.

FOIA provides that a district court

> has jurisdiction to enjoin the *agency* from *withholding agency records* and to order the production of any *agency records improperly withheld* from the complainant. In such a case the court . . . may examine the contents of such *agency records* in camera to determine whether such records or any part thereof shall be *withheld* under any of the exemptions set forth in subsection (b) of this section . . . . 5 U.S.C. §552(a)(4)(B) (emphasis added).

This language plainly states that "withholding" of "agency records" by an "agency" are the operative facts which bring the Act's enforcement provisions into play.[14] Does an agency "withhold" documents when it does not have them? Does authority to order production of "agency records" that are "improperly withheld" include authority to order the agency to obtain documents it does not have so it can comply with an FOIA request? If not, can a court cure what would otherwise be a lack of subject matter jurisdiction by

[14] Paragraph (a)(4)(B) is not the only place where such language is used. *See, e.g.*, 5 U.S.C. §552(a)(4)(F) ("Whenever the court orders the production of any *agency records improperly withheld* from the complainant . . . and the court additionally issues a written finding that the circumstances surrounding the *withholding* raise questions whether agency personnel acted arbitrarily or capriciously with respect to the *withholding*, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the *withholding*.") (emphasis supplied); 5 U.S.C. §552(b)(3) (exempting from disclosure matters that are specifically so exempted by statute.

ordering persons who are not "agencies" to deliver documents to the agency?

We think all of these questions must be answered in the negative. The language and structure of the Act, its relation to the Federal Records Act, and the relevant case law all support the conclusion that FOIA has no application to documents that are not in the custody or control of an agency when a request is filed. The District Court's belief that this statutory limitation could be overcome by ordering third parties who are not "agencies" to deliver the documents to the agency is erroneous. The requesters had no cause of action against Dr. Kissinger, against the Librarian, or against the Department of State. Their complaints should, accordingly, have been dismissed.

A. FOIA Does Not Apply To Documents Not In The Custody Or Control Of An Agency.

It is settled that the Act's disclosure policies do not require an agency to *create* records, even though the agency's failure to do so deprives the public of information which might otherwise have been available to it. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-62 (1975); *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 192 (1975). The reason is found in the clear distinction the Act makes between "information" and "records." Subsections (a)(1) and (a)(2) impose an affirmative duty to make available specific categories of "information;" subsection (a)(3) requires only that "records" be produced. The duty to provide the specific categories of information set forth in subsections (a)(1) and (2) includes a

provided the statute either "requires that the matters be *withheld*" or "establishes particular criteria for *withholding* or refers to particular types of matters to be *withheld*") (emphasis supplied). The Privacy Act, which is modelled on FOIA, employs similar language. *See* 5 U.S.C. §552a(g)(3)(A).

duty to reduce the information to writing if that has not already been done. By contrast, the duty to provide "records" only requires production of

> documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 162.

If an agency has no independent duty under FOIA to create documents it does not choose to make, logic suggests that it also has no independent duty to obtain documents it does not want simply because an FOIA requester has asked for them. This, indeed, has been the established construction of the Act since its inception.

Following FOIA's enactment in 1966, the Attorney General issued guidelines for the use of all federal departments and agencies in complying with the new statute. The guidelines state that FOIA

> refers, of course, only to records in being and in the possession or control of an agency. . . . [It] imposes no obligation to compile or procure a record in response to a request. *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, 23-24 (June 1967).

A number of lower federal courts have reached the same conclusion. *Nolen v. Rumsfeld*, 535 F.2d 890, 891 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977) (suit "seeking production of missing records . . . is not within the purview of" FOIA); *Nichols v. United States*, 325 F.Supp. 130, 137 (D.Kan. 1971), *aff'd*, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972) ("the Court may not require production of records not in the custody or control of an agency"); *Ciba-Geigy Corp. v. Mathews*, 428 F.Supp. 523, 532 (S.D.N.Y. 1977) ("the Government cannot be compelled to

obtain possession of documents not under its control or furnish an opinion when none is written").

In *Forsham v. Califano*, 587 F.2d 1128 (D.C. Cir. 1978), *cert. granted*, 47 U.S.L.W. 3740 (No. 78-1118, May 15, 1979), the issue was whether FOIA applied to raw data used by a private consulting group as the basis for a research report it had prepared for an agency. These data had been retained by the consulting group, subject to the agency's right by contract and by regulation to review and copy them. The requesters argued that the data should be treated as "agency records" for FOIA purposes because the agency had conceived the project, funded collection of the data, and made administrative decisions based on the research results. They also said the agency's access rights gave it "complete dominion and control" over the data. *Id.* at 1136.

The court rejected the idea that the data could be "agency records" simply because the agency had access rights which it did not choose to exercise:

> Plaintiffs' claim is in effect an assertion that the federal government should be required — formally or constructively — to exercise its contract-grant right of access in order to provide general public access. We cannot accept this proposition. The Freedom of Information Act only gives a right of access to agency records in existence. It does not confer a right to have the government generate agency records, either by creation, subpoena or contract demand. This conclusion is implicit in *NLRB v. Sears, Roebuck & Co.* . . . .

> The governing principle is that only if a federal agency has created or obtained a record (or has a duty to obtain the record) in the course of doing its work, is there an agency record that can be demanded under FOIA. *Id.* (footnotes omitted)

In a footnote to the majority opinion, Judge Leventhal explained that there may be occasions when an agency has a legal duty to obtain particular documents not then in its possession. *Id.* at n.18.[15] On such occasions, he thought FOIA might be joined with a mandamus action to secure access to the documents.[16] His point, of course, was that the claim to require the agency to disclose a document is wholly separate from the claim to require the agency to obtain it. The latter claim cannot be founded on FOIA, which imposes no duty to procure documents, but must have an independent basis in law if it is to be enforced. Since in *Forsham* there was no independent legal basis upon which an order to require the agency to exercise its access rights to

[15]This portion of the opinion was *dictum*, as Judge Leventhal acknowledged. *Id.* Judge MacKinnon, concurring, expressly reserved judgment "as to the extent to which the FOIA should be interpreted to cover records not created by, obtained by, or in the possession of an agency." *Id.* at 1139.

[16]Judge Leventhal gave no examples of cases where mandamus might be used to require an agency to procure a record. He did, however, remark that "[o]bviously a government agency cannot circumvent FOIA by transferring physical possession of its records to a warehouse or like bailee." *Id.* at 1136 n.19. We agree that the agency cannot circumvent FOIA in this manner, but think the reason is that the agency would have constructive possession of its records through the bailee. If the agency has the capacity to produce its records by instructing the bailee to return them, refusal to do so plainly would be a "withholding" within the meaning of 5 U.S.C. §552(a)(4)(B). However, if the agency must take some other step to obtain the documents, such as issuing a subpoena, its failure to act does not constitute a "withholding" and therefore cannot violate FOIA.

the data could be grounded, the proper remedy was dismissal.[17]

That analysis is fully consistent with this Court's reasoning in *Sears* and in *Grumman*. As Mr. Justice White observed in *Grumman*, the Act

> imposes no *independent* obligation on agencies to write opinions. It simply requires them to disclose the opinions which they do write. 421 U.S. at 192 (emphasis added).

The point is that FOIA does not purport to tell agencies what documents to create, maintain or otherwise possess as records; it simply requires agencies to disclose such " agency records" as they have chosen to keep.

FOIA applies when the agency improperly withholds its "records," but it does not apply when the requesters' complaint is addressed to alleged deficiencies in the agency's recordkeeping practices. This is true whether the complaint relates to the agency's failure to create documents the requesters think it should have created — as in *Sears* and

[17]Judge Bazelon, dissenting, thought lack of possession need not be controlling in cases where the right to possession existed and could easily be exercised. However, he agreed that

> the Government's right of access . . . is important for FOIA purposes since it establishes the basis for Government compliance with FOIA requests. Obviously, the Government must be able to obtain copies of requested agency "records" quickly and without legal impediment. For example, if the Government had to purchase certain data or subpoena certain records to comply with a FOIA request, these materials might not be considered agency "records." *Id.* at 1143-44.

Whatever the general merits of the dissenting view, it is clear that Judge Bazelon would not stretch FOIA so far as to require an agency to sue for possession of documents it does not have. When the agency's ability to produce the documents is thus impaired, the case ceases to be an FOIA action and must proceed, if at all, on some other basis.

Grumman, to the agency's failure to add to its records system documents the requesters want to see — as in *Forsham* and *Ciba-Geigy v. Mathews*, or to the agency's failure to retain control over documents the requesters think it should have kept — as in *Nolen v. Rumsfeld* and *Nichols v. United States*. In all of these cases, the requesters' complaints were dismissed upon a showing that the agency lacked possession of the documents. There was no further inquiry as to why the documents were not there, because complaints addressed to this issue transcend the limits of FOIA.[18]

B. FOIA Does Not Authorize Equitable Relief Against Persons Who Are Not Agencies.

The District Court, of course, recognized that FOIA could not apply unless the State Department first obtained possession of the notes, just as it evidently recognized its lack of authority to order the Department to procure them. But the court thought it could avoid this statutory limitation by invoking its "broad equitable powers" to compel Dr. Kissinger and the Librarian to deliver the notes to the Department so the Act *would* apply. Pet. App. 55a.

The District Court said its solution is supported by this Court's opinion in *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974). *Bannercraft*, however, says

[18]The above cases may be contrasted to others where the issue was whether documents in an agency's custody were its records. *See Goland v. CIA*, No. 76-1800 (D.C. Cir., May 23, 1978) (Congressional document); *Cook v. Willingham*, 400 F.2d 885 (10th Cir. 1968) (judicial records). In such cases a court does have jurisdiction to determine whether the documents are agency records, because the agency has the capacity to produce them once that decision is made. It is, however, pointless to consider whether documents are "records" if the agency could not be ordered to produce them. When this is the case, the agency's lack of possession is dispositive because the court's lack of authority to order it to obtain possession is dispositive.

nothing about the power of a district court to order an agency to procure a document it does not have, or to order persons not subject to the Act to deliver such documents to an agency.

The documents at issue in *Bannercraft* were official agency records in the custody of the Renegotiation Board. The only question was whether 5 U.S.C. §552(a)(4)(B) authorized enjoining further Board proceedings until such time as the Board produced records it was wrongfully withholding. The Court held the injunction was improper in the case before it, because this would interfere with established procedures for renegotiating government contracts. In doing so, it also said that an injunction against withholding documents was not the sole equitable remedy authorized to aid in enforcing the Act. 415 U.S. at 17-20. The District Court read this passage as a blanket authorization to employ any form of equitable relief which furthered its "role as the 'enforcement arm' of the Freedom of Information Act." Pet. App. 55a. We believe this is an egregious misreading of *Bannercraft*.

FOIA applies only where an *agency* improperly *withholds* records. A court's power to afford *any* relief under this statute depends on the existence of these jurisdictional facts. The only "agency" before the District Court was the Department of State, which did not possess and therefore was not "withholding" the documents requesters said they wanted. Since the Act could not apply to the agency defendant, it surely could not apply to anyone else. The District Court's notion that it could use "equitable powers" against third parties to *create* jurisdiction over the agency where none otherwise existed is legal nonsense. A court of equity's inherent authority to enforce a statute does not include authority to expand its substantive reach. *See Commercial Security Bank v. Walker Bank & Trust Co.*, 456

F.2d 1352, 1355 (10th Cir. 1972); *Doyle v. Milton*, 73 F.Supp. 281, 284-85 (S.D.N.Y. 1947). There is no indication whatever in *Bannercraft* of any intention to abandon this fundamental juridical principle.

Respondents had no legally enforceable FOIA claim against the State Department, or any right under that or any other statute to sue Dr. Kissinger or the Librarian of Congress. The District Court had no subject matter jurisdiction to enter an order against any of these parties. Rather than seek a "solution" in equity, it should have dismissed requesters' complaints for failure to state a claim upon which relief could be granted.

C. Neither FOIA Nor Any Other Law Authorizes Citizen Suits To Retrieve Agency Records.

Although the private respondents' suits were ostensibly based on FOIA, the essence of their complaints was that the telephone notes were State Department agency records which never should have been transferred to the Library. In substance, their suits were *qui tam* actions brought to recover for the State Department property the Department did not itself claim. But FOIA confers no such rights.

FOIA assumes the existence of "agency records," without defining what they are, because Congress expected the agencies to make that determination for themselves. "Agency records" means documents an agency has chosen to incorporate into its records system — not documents that journalists, historians, political scientists or other members of the general public think the agency should have in its files. The Act — despite its important public information function — was never intended as a device to usurp agency recordkeeping decisions. The notion that it authorizes citizen suits to require agencies to augment their

files simply cannot be squared with the purposes and policies of the Federal Records Act.[19]

The provision of FRA which deals specifically with recovery of unlawfully removed agency records is 44 U.S.C. §3106. That section requires the head of each federal agency to notify the Administrator of General Services "of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is head that shall come to his attention . . . ." It further states that the agency head shall, with the assistance of the Administrator, "initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed from his agency. . . ."

Although requesters disclaimed reliance on any statute other than FOIA,[20] it seems clear that their suits were designed in one way or another to enforce 44 U.S.C. §3106 — either by means of a private right of action under FRA or by implying the same remedy under FOIA. It is equally clear that there is no basis on which either approach could be allowed.

[19]We use the term "Federal Records Act" generically to denote a series of statutes enacted to deal with agency recordkeeping responsibilities, including the Records Disposal Act of 1943, the Records Act of 1950, and the Federal Records Management Amendments of 1976. These and related statutes are now codified in 44 U.S.C. Chapters 29, 31 and 33. For a useful description of FRA's historical evolution, *see* National Study Commission on Records and Documents of Federal Officials (hereinafter "National Study Commission"), *Memoranda of Law*, 87-103 (1977).

[20]*See* Brief for Appellees Military Audit Project, *et al.*, 17, filed in the Court of Appeals on May 24, 1978, and the following pleadings filed by the RCFP requesters in the District Court: Plaintiffs' Reply Memorandum of Points and Authorities in Support of Their Motion for a Preliminary Injunction, 6-7 (May 10, 1977); Plaintiffs' Reply Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment, 18-19 (Aug. 8, 1977).

1. No private right of action can be implied under 44 U.S.C. §3106.

To determine whether a private remedy is implicit in a statute not expressly providing one, the relevant questions are whether the plaintiff is one of a class for whose especial benefit the statute was enacted, whether there is any indication of a legislative intent to create such a remedy, and whether it is consistent with the underlying purposes of the legislative scheme to imply the remedy. *Cort v. Ash*, 422 U.S. 66, 78 (1975); *accord*, *Cannon v. University of Chicago*, No. 77-926, *slip op.* at 9-10 (S.Ct., May 14, 1979); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 37-41 (1977).[21]

Requesters meet none of these tests.

First, there is no indication whatever that 44 U.S.C. §3106 or any other provision of FRA was intended to benefit persons such as the requesters. The purpose of the legislation is to regulate the internal records creation and management practices of the Executive Branch of the Government. The statute does not mention any special class of persons whom its provisions are intended to protect or benefit; indeed, it is clear that the recordkeeping duties it creates are for the benefit of the public at large. This Court has been especially reluctant to imply a private right of action in such cases. *See Cannon v. University of Chicago*, *slip op.* at 11n.13, p.13.

Second, the legislative scheme points to denial of a private remedy.

Under FRA, each agency has responsibility for creating and preserving its own records. 44 U.S.C. §3101. In performing these duties, the agency acts in cooperation with the Administrator of General Services, 44 U.S.C. §3102(2),

[21]A fourth factor — irrelevant here — is whether the asserted cause of action is one traditionally relegated to state law.

who provides advice and guidance on standards and procedures for efficient records management. 44 U.S.C. §2904. In implementing his responsibilities, the Administrator is entitled to obtain reports from the agencies on their recordkeeping activities, 44 U.S.C. §2111, and to inspect the records of an agency "for the purpose of rendering recommendations for the improvement of records management practices and programs." 44 U.S.C. §2906. If he finds the agency's recordkeeping practices are not in accordance with law, he may inform the head of the agency of his findings and make recommendations for corrective action. 44 U.S.C. §2111. If the corrective action is not taken, he is directed to "submit a written report of the matter to the President and the Congress." *Id.*

This comprehensive program for records management involving the agency, the Administrator of General Services, the Attorney General, the President and the Congress, provides no place for the intrusion of private parties.

Finally, allowance of a private action would undermine the purposes of the Act by interfering with the Government's regular procedures relating to the creation, maintenance and disposition of records. The decision to file a particular document as a "record" is made by the agency, acting alone; the decision to discard a record once it has been filed is for the agency and the Administrator, acting together, with final authority vested in the Administrator. The decision to recover a "wrongfully removed record" requires the concurrence of the agency, the Administrator, and the Attorney General, with possible recourse to the President and the Congress in the event they do not agree. It would be wholly inappropriate for the Judiciary to intervene in such an area at the instance of private litigants.

2. No supplemental retrieval remedy can be implied under FOIA.

The District Court acknowledged the existence of the statutory remedy, but concluded that the requesters need not "wait for institution of the statutory retrieval action" where government action "appears unlikely." Pet. App. 55a. Its solution was to supplement the statutory retrieval action by implying a similar remedy under FOIA. This approach was based on the erroneous belief that *Bannercraft* authorized use of equitable powers to expand FOIA's scope. That mistake in turn distracted the court from what should have been its primary inquiry. The real question — ignored below — was whether it is consistent with the statutory scheme to allow members of the general public to invoke FOIA as a vehicle for retrieving documents which the agency does not seek or claim.[22]

Under standard principles of statutory construction, "a precisely drawn, detailed statute pre-empts more general remedies." *Brown v. General Services Administration*, 425 U.S. 820, 834 (1976); *see also National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974); *Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944); *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 301 (1943). We think the comprehensive nature of the FRA

[22]The question is important, because FOIA is an exceptional statute. The Act dispenses entirely with the requirement of standing; any member of the public may invoke its remedies without regard to need or interest. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 143n.10. The Act also provides for *de novo* review of agency decisions to withhold records on grounds of exemption, and in such cases reverses the usual rules on burden of proof. *See Department of the Air Force v. Rose*, 425 U.S. 352, 379 (1976). If these exceptional features of the Act are not confined to cases where an agency is "withholding" records, the result will be a dramatic extension of judicial power to review agency recordkeeping decisions free of the usual restraints applicable to judicial review of agency action.

regulatory system, together with the very detailed provisions that statute makes for institution of record retrieval actions, belies any suggestion that Congress expected FOIA injunctive suits to be used as a substitute for FRA retrieval actions. This is particularly true where, as here, it is clear that no private action could be maintained under 44 U.S.C. §3106.

In any event, before presuming that FOIA may be invoked to supplement the specific FRA remedy, it would at least be necessary to find support for this view in the legislative history of FOIA. *See Brown v. General Services Administration*, 425 U.S. at 833-34. This history, however, is consistent only with the opposite conclusion.

FOIA has been the subject of intense Congressional interest since its enactment in 1966. It has twice been substantively amended, in 1974 and again in 1976, and on both occasions the amendments were in part prompted by a desire to reverse court decisions with which the Congress did not agree.[23] Despite this close scrutiny, Congress has never indicated it disagrees either with the Attorney General's view that the Act cannot be used to force agencies to procure documents or with the lower court decisions which reach the same conclusion.

The same committees that considered the 1974 and 1976 amendments to FOIA were simultaneously working on the legislation that was enacted in 1974 as the Privacy Act, and on the substantial revisions to FRA which were adopted as the Federal Records Management Amendments of 1976. The FRA revisions contain no hint that agency recordkeeping decisions shoud be subject to judicial review at

[23]The 1974 amendments, in particular, were the product of careful oversight hearings which involved both a study of agency practices under FOIA and court decisions construing it. *See* H.R. Rep. No. 93-876, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6267, 6268-70.

the instance of private citizens. The Privacy Act, however, expressly provides for judicial review if an agency "fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the . . . individual . . . ." 5 U.S.C. §552a(g)(1)(C). It also authorizes the individual to request amendment of agency records relating to him, 5 U.S.C. §552a(d)(2), and empowers a court to order the agency to make the amendment. 5 U.S.C. §552a(g)(2)(A).

The provisions of the Privacy Act show that Congress knows how to provide for judicial review of agency recordkeeping determinations when it wishes to do so. That such provisions originated with the same committees which then were engaged in revising FOIA and FRA is convincing evidence that the omission from these statutes of any similar procedures for review of agency recordkeeping determinations was intentional. We think this history shows that Congress did not expect agency recordkeeping decisions to be subject to any form of judicial review except in the limited circumstances defined in the Privacy Act. Certainly the opposite inference — that Congress intended FOIA to authorize virtually unlimited review of agency decisions to create or procure or file or retain documents as records — must be rejected.

* * *

Despite this history, requesters argue that FOIA *should* be construed to give private citizens the right to sue to obtain documents they believe an agency should have in its files. Their reasons are based on conjectural fears that FOIA may be circumvented if private citizens are not permitted to police agency recordkeeping practices. They say:

> The broad disclosure responsibilities imposed by the Act could be easily evaded if the Act ceased to apply as soon as agency records left the physical

> custody of the agency. Agency employees could simply take home or store with friends documents that they considered politically sensitive or personally embarrassing. Similarly, such documents could be transferred to sister branches of the government, like the Library of Congress, to which the Act does not apply . . . . Agency officials, unwilling to take action against offending employees or perhaps relieved that damaging information had been suppressed, could simply stand by idly without attempting to retrieve the documents that had been improperly removed from agency custody. Brief for Respondents Reporters Committee for Freedom of the Press, *et al.* in Opposition, 21 (Feb. 5, 1979).

At the outset, we note that this is not a case where any "evasion" of FOIA has been alleged, much less proved. Requesters' speculation about what might happen in other cases cannot obscure the fact that in this case their requests were filed *after* Dr. Kissinger had transferred the notes to the Library of Congress. This transfer was made near the end of Dr. Kissinger's term, in connection with his retirement from office, pursuant to written procedures approved by the Department's chief administrative officers. In making the transfer, Dr. Kissinger complied with every rule applicable to retiring Department employees.[24] He also ob-

[24]Requesters argued below that Dr. Kissinger should have submitted the telephone notes — which were stored in his personal files — for review by the Department's records officers before removal. There is no such requirement. The Department's regulations expressly recognize that papers which have been "explicitly designated or filed as personal at the time of origin or receipt may be removed . . . without approval of the Director, Foreign Affairs Document and Reference Center." 5 FAM §417.1a. The Department's chief administrative officers — including the Director of FADRC—knew the telephone notes were in Dr. Kissinger's personal files when those files were transferred to the Library of Congress. A.260a. Each expressly approved the transfer. A. 252a, 254a. *See* p. 7 n.9, *supra*.

tained a written opinion of the Legal Adviser that the notes were personal papers he was entitled to retain. Requesters may disagree with that opinion, but disagreement provides no reason to claim "evasions" will occur if this Court does not accept the extreme construction of the Act they advocate.[25]

But the principal defect in requesters' position is the assumption that the Act's inherent limitations may be ignored. The answer to this was provided in *Forsham*:

> [T]he general policy of avoiding agency secrecy does not give a charter for extending the law beyond the domain of "agency" and "agency records" that is the keystone of the Act. . . . Congress struck a balance in fashioning the FOIA, which precludes the boundless pursuit of one policy goal, even a dominant policy, to the exclusion of all countervailing considerations. . . .
>
> What is requested in this action, in our view, is an extension of the statute on claim of public interest that must be appraised by the legislature which can give the subject extended study, elicit opinions from all interested sources, and consider the pro's and con's. 587 F.2d at 1137-38.

Congress has already made clear that it did not intend FOIA to serve as a general charter for private attorneys

[25]We think the most effective check against "abuses" by retiring officials is the authority their successors have to initiate retrieval actions under 44 U.S.C. §3106 when this is deemed necessary to preserve the integrity of the agency's records systems. That the Department of State has not initiated such an action in the more than two years since Dr. Kissinger left office is evidence that the Department has the records *it* needs to conduct *its* business. What requesters are really saying is that the Department should take action to secure documents *they* want for *their* purposes, and that if it will not assist them this Court should do so by implying a retrieval remedy under FOIA. We doubt that Congress ever expected FOIA would be used for such dubious purposes.

general to police the recordkeeping activities of government agencies. If that statutory limitation is to be eliminated, Congress, and not the courts, should make the change.

* * *

The decision below represents a hopeless confusion of ideas. Had the private respondents sued only Dr. Kissinger and the Librarian, it would have been obvious that they had no standing under FOIA, FRA, or any other law to assert an ownership claim the State Department did not choose to make. *Cf. Nichols v. United States*, 460 F.2d at 674-75. Had they sued only the State Department, it would have been equally clear that they could not use FOIA, FRA or any other law to compel it to assert its ownership interests against Dr. Kissinger. Why respondents' positions were improved by indiscriminately mixing separate claims in a single count was not explained, and in our view cannot be explained.

The simple truth is that respondents' complaints failed to state a cause of action on which relief could be granted. The failure to recognize this below, and rule accordingly, was error.

II. THE NOTES MADE OF DR. KISSINGER'S TELEPHONE CONVERSATIONS WHEN HE WAS SECRETARY OF STATE ARE NOT "AGENCY RECORDS" SUBJECT TO FOIA.

One thing is certain: the telephone notes do not resemble official government records. They are rough, unedited typewritten materials which were never part of the State Department's records system. They were used only as work aids, to promote efficiency of operations in Dr. Kissinger's office. They were not intended to be the permanent records of Dr. Kissinger's decisions and actions, and cannot even be said to be accurate summaries of his conversations. A. 109a, 169a. The State Department, in common with other

agencies of the government, has never treated materials of this type as records.

The question of the notes' status was first raised at the State Department in January 1976, when an FOIA request was made for a portion of them. The claim was denied because the notes "have not been preserved as evidence of Department of State business." A. 172a. This position was reaffirmed on November 11, 1976, when the Legal Adviser concluded that "under Department of State regulations and other legal criteria, these particular papers are personal and may be retained by you when you leave office." A. 84a. The same view was again confirmed on January 28, 1977, and March 4, 1977, when the Department denied the private respondents' FOIA requests.[26]

The State Department's conclusion that the notes were not its records was based on its regulations and customary practices, as it interepreted them. The opinion of the Legal Adviser explains in detail why that decision was proper. When the District Court reached a contrary result, it did not hold the State Department's regulations were invalid, or find that the Department had improperly applied them, or explain why the Legal Adviser's opinion was wrong. It ignored these matters altogether, and held instead that the notes were Department records because they were the "property of the United States." Pet. App. 58a. This

[26]Requesters argue the State Department made no "decision" because the Legal Adviser and other persons involved were Dr. Kissinger's subordinates. *See* Brief For Respondents Reporters Committee For Freedom of the Press, *et al.* in Opposition, 14-15 (Feb. 5, 1979); Brief of Respondent Military Audit Project, *et al.* in Opposition to Petition for Certiorari, 5 (Feb. 6, 1979). The Legal Adviser, a respected member of the bar, was within weeks of his departure from office. Equally important, the requesters forget that their FOIA requests were denied *after* Dr. Kissinger had left office, by persons who were then serving under Secretary Vance. A. 61a, 78a.

holding rests on what the court called "a basic rule of copyright law that work created by an employee within the scope of employment is the property of the employer." Pet. App. 56a.

That conclusion cannot be accepted even as an adequate statement of the "basic rule" it purports to apply.[27] But the relevant question is not who "owns" the notes. Requesters' case is based on FOIA, which applies only to "agency records." Whether the notes are "agency records" is properly resolved by the Federal Records Act and the regulations adopted to implement it, not by analogies drawn from common law "ownership" concepts.[28]

[27] The copyright cases the District Court cites make clear that the underlying question is whether the contested literary or artistic work was created by the employee for his employer's use pursuant to an express or implied contractual obligation. *See, e.g., Scherr v. Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970). Whether Dr. Kissinger had an obligation to create the notes can only be determined by reference to the Department's rules and practices. Dr. Kissinger's duty as a government employee was to document his significant oral decisions, commitments and discussions. 5 FAM §423.2-1. This he did — not with the notes but with memoranda and other official documents and with the extracts he later made from the notes to assure completeness of the official files. The notes used in the preliminary stages of this documentation process were of no interest to his "employer," and he was free under the Department's interpretation of the employment relation to retain or discard them as he chose.

[28] The District Court's "ownership" theory suffers from another difficulty. The basic rationale — that any document produced by a federal employee on government time using government resources is government property — applies with equal force to unofficial papers created by the President and Vice-President, by Congressmen, and by members of the Judiciary. Some of these federal officials have, like cabinet officers, donated collections of papers to libraries with no suspicion whatever that the act of donation represented an illegal alienation of government property. *See* J. Broderick, *Personal Papers of Federal Officials* (Library of Congress 1976); National Study Commission, *Study of the Records of Supreme Court Justices* (1977). If the decision below stands, all restrictive covenants relating to such donations are vulnerable to challenge on the theory that the donor did not "own" the papers and thus had no right to control the manner of their disposition. *See Nixon v. Sampson*, 389 F.Supp. 107, 120-23, 133-45 (D.D.C.), *stayed sub nom. Nixon v. Richey*, 513 F.2d 427 (D.C. Cir. 1975), *dismissed as moot*, 437 F. Supp. 654 (D.D.C. 1977), *rev'd and remanded for trial*, No. 77-2123 (D.C. Cir., Dec. 21, 1978).

A. The Applicable Statutes And Regulations Support The Conclusion That The Notes Are Not "Agency Records."

The statutory definition of records is set forth in 44 U.S.C. §3301:

> 'records' includes all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or *appropriate for preservation by that agency* or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the government or because of the informational value of data in them. . . . [E]xtra copies of documents preserved only for convenience of reference . . . are not included. (Emphasis added)

This definition does not, as the District Court assumed, require that every document generated by a government employee in the performance of his duties be treated as an official record. It expressly limits "records" to documents that are "appropriate for preservation" as evidence of an agency's "organization, functions, policies, decisions, procedures, operations or other activities."

The limitation is not inadvertent. Congress has repeatedly stressed the need for restraint in the creation of records. In 1943, when 44 U.S.C. §3301 was first enacted, the House Report stated that the definition of records

> would make it clear that [the agencies] are not obliged to consider every scrap of paper on which writing or printing appears as a record. H.R. Rep. No. 559, 78th Cong., 1st Sess., *reprinted in* [1943] U.S. Cong. Serv. 2140, 2141.

This was reemphasized in 1950, when the Senate Committee stated that

> [r]ecords come into existence, or should do so, not in order to fill filing cabinets or occupy floor space, *or even to satisfy the archival needs of this and future generations, but first of all to serve the administrative and executive purposes of the organization that creates them.* There is danger of this simple, self-evident fact being lost for lack of emphasis. *The measure of effective records management should be its usefulness to the executives who are responsible for accomplishing the substantive purposes of the organization.* S. Rep. No. 2140, 81st Cong., 2d Sess., *reprinted in* [1950] U.S. Code Cong. Service 3547, 3550 (emphasis added).

The Federal Records Management Amendments of 1976 made the point explicit by inserting into the statute an express declaration that one of the purposes of records management is to establish "mechanisms of control with respect to records creation in order to prevent the creation of unnecessary records." 44 U.S.C. §2901(3).

Rules adopted by the State Department under FRA reflect the same concerns. The Department's general policy on records creation recognizes that there is a need both to

"insure that important policies, decisions, and operations are adequately recorded" and to prevent the "accumulation of unnecessary files." 5 FAM §422.1. Its specific recordkeeping rules repeatedly emphasize that their objective is to record "important," "necessary," "essential," "significant," and "pertinent" information. *See* 5 FAM §§422.1, 423.1, 423.2, 423.2-1, 432. Contrary to the District Court's assumption, the Department does not seek to capture every paper produced by its employees on government time using government resources and materials. Its intent, rather, is to assure that the information needed to serve its administrative purposes is adequately recorded and preserved.

This principle is reflected in the regulations which apply to various kinds of informal papers that are made or received by Department employees. For example, 5 FAM §432 provides that

> [w]hen official policy matters are discussed in personal correspondence, that portion pertaining to functions or activities of the Department . . . is to be extracted and made a part of the official records.

The regulation does not require that the entire letter be filed simply because some of its contents pertain to official business; only the pertinent provisions are to be included in the Department's records. Moreover, the Department has explained that "in practice" the rule applies only to "papers containing a discussion of Department activities or decisions not otherwise reflected in existing Department records." A. 204a.

The same principle applies to an employee's duty to create a record of business transacted orally. That duty is set forth in 5 FAM §423.2-1:

> Decisions, commitments, and discussions of any significance which are oral in nature (for example, person-to-person, by telephone, in staff meetings, or in conferences) must be made a matter of record. The information should be written in the form of aide-memoire, memorandums of conversation, or memorandums to the file.

Again, the emphasis is on documentation of decisions, commitments and significant discussions; there is no duty to create a record of *every* conversation, or to memorialize *everything* which is said in *any* conversation.

Finally, 5 FAM §423.2-8 provides that

> [r]ough drafts and working papers, such as preliminary notes, do not constitute required documentation unless they form an integral part of the finished document or show changes in policy.

Preliminary materials of this type are used in making the agency's official records. When the finished documents are filed, the agency has no further interest in the preliminary materials. *See* A. 204a, 221a.

These regulations make clear that the Department's interest is in finished documents, not in rough drafts, notes, or personal correspondence. They also confirm what common sense suggests: government employees routinely generate large quantities of written materials which, though made or received in performance of their official duties, are nonetheless not treated as "records." Such "non-record materials" are not filed because they do not constitute "required documentation." Indeed, the Federal Property Management Regulations, which provide guidance to all federal agencies, affirmatively require that

> [n]on-record materials, such as . . . preliminary worksheets, and similar papers that need not be made a matter of record, *shall not be incorporated in the official files of the agency.* 41 C.F.R. §101-11.401-3(d) (emphasis added).

It has long been recognized that senior government officials generate notes, work aids, office diaries, and similar materials that are not "records" even though they pertain to the transaction of public business. Such materials have traditionally been kept separately from the official records of the agencies, and treated as personal papers of the official who generated them.

This practice was officially noticed in a 1959 Cabinet Paper issued during the Eisenhower Administration.[29] That paper, which was the product of a major study of the Records Act of 1950, attempted to formulate guidelines to accommodate the competing policy considerations associated with the existence of these kinds of non-official documents. It concluded that personal work aids, such as office diaries, could lawfully be retained by retiring officials when they left office, provided the removal did not leave a gap in the official records and adequate precautions were taken to prevent unauthorized disclosure of confidential government information. A. 200a-201a.

That this basic approach has not changed is illustrated by the guidelines issued in 1975 by the Office of Management and Budget to implement the Privacy Act. OMB's analysis of the Privacy Act points out that the definitions of "record" and "system of records" in that statute require that the record materials be "maintained by" or "under the

[29] For a description of the Cabinet Paper and its significance in the development of customary practice in this area, *see* National Study Commission, *Memorandum of Findings on Existing Custom or Law, Fact and Opinion*, 60 (1977).

control of" an agency. *See* 5 U.S.C. §552a (a)(4), (5). OMB states that these qualifying phrases were used

> to distinguish "agency records" from those records which, although in the physical possession of agency employees and used by them in performing official functions, were not considered "agency records." Uncirculated personal notes, papers and records which are retained or discarded at the author's discretion and over which the agency exercises no control or dominion (e.g., personal telephone lists) are not considered to be agency records within the meaning of the Privacy Act. 40 F.R. 28948, 28952 (July 9, 1975).

More recent evidence is provided by a 1977 staff report prepared for the National Study Commission on Records and Documents of Federal Officials. This report, which was based on an empirical study of agency practices,[30] states that

> [f]ederal officials in all branches of government accumulate information in the form of memoranda of conversations, transcripts, speeches, taped conversations, diaries, and correspondence reflecting the private opinions and advice of colleagues and others. Such records are not "personal" in that they do not deal with strictly private affairs and they are not "official" in the sense that they do not directly document the transactions and policies of federal organizations. Such material has usually been treated as personal correspondence. National Study Commission, *Memorandum of Findings on Existing Custom or Law, Fact and Opinion*, 59 (1977).

[30] Some of the agency reports used in the study are set forth in the Appendix to this Brief. *See* A. 199a (Department of State), 210a (General Services Administration), 217a (Department of Defense), 227a (Federal Trade Commission), 232a (Civil Service Commission), 235a (Department of the Interior).

The Commission's own conclusion is that each agency has

> an area of discretion as to non-record materials that officials may be permitted to retain, provided only that such retention does not diminish the official record of the agency, violate confidentiality required by national security, privacy, or other interests protected by law, or abuse normal administrative economies. National Study Commission, *Final Report*, 19 (1977).

The notes of Dr. Kissinger's telephone conversations cannot be distinguished from the drafts, working papers, office diaries, preliminary notes and work aids that the State Department and other agencies regularly have held are not "agency records." The District Court did not even try to make the distinction, because it erroneously assumed that *any* document — regardless of use or content — created by a government employee within the scope of his employment is an "agency record." That assumption cannot be reconciled with the statutory scheme relating to records management, or with agency regulations and practices.

B. The State Department's Decision That The Notes Were Not Its Records Was Not Arbitrary, Capricious, An Abuse Of Discretion, Or Contrary To Law And, Accordingly, Must Be Followed.

The central point of the federal records management statutes is that the responsibility for making records "containing adequate and proper documentation" of an agency's business is vested in the affected agency. 44 U.S.C.

§3101. The structure and history of FRA make clear that it is the agencies which must determine their records needs — not historians, reporters, or other members of the general public. Indeed, one may ask how anyone other than the agencies could decide such matters. Certainly a court could not determine whether a particular document is "appropriate for preservation by that agency," 44 U.S.C. §3301, without full knowledge of the business of the agency and the nature of the official correspondence, memoranda, minutes and other records in its files relating to the same subject matter.

The District Court ignored this practical consideration, and instead ruled that the notes were State Department agency records as a matter of law. We have already demonstrated both that this conclusion was wrong in its choice of the law to be applied, and that application of the proper law would have produced the opposite result. However, we think the decision was also wrong in its assumption that courts are free to disregard an agency's determinations in deciding whether particular documents are "records" of that agency.

In *Udall v Tallman*, 380 U.S. 1, 16 (1965), this Court said:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings" . . . . *When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.* (citations omitted) (emphasis added)

The District Court disregarded this fundamental rule when it substituted its own view of the law for the Department's interpretation of its regulations.

The State Department's conclusion that the notes were not its records was consistent with its interpretation of FRA and of its own regulations. That conclusion was not arbitrary, capricious, or an abuse of discretion. Neither was it contrary to law. The question for the District Court was not whether plausible grounds could be found for other constructions of the regulations. Nor could the District Court substitute its own view of these regulations. It was bound either to defer to the State Department's interpretation, or to explain why that interpretation was wrong. Its failure to do one or the other was error.

C. Fundamental Considerations Of Privacy Support The Conclusion That The Notes Are Not "Agency Records."

Apart from the statutory and regulatory issues, there is another, equally persuasive, reason why the District Court's decision must be rejected. Agency recordkeeping regulations and practices seek to reconcile employee privacy rights with the Government's interest in maintaining adequate records of its business. The District Court's decision that all papers — irrespective of content, purpose or use — produced by government employees on government time are "agency records" ignores this balance. To adopt such a construction in the face of contrary agency practice is unjustified; to do so on a retroactive basis is constitutionally intolerable.

Government employees, like other citizens, do and should have a right to think, to explore, to discard, to develop ideas without fear that their thoughts will be prematurely published. The State Department's regulations and prac-

tices, as well as those of the agencies generally, recognize this fundamental right.

Agencies require employees to document decisions, commitments and significant discussions, *see* 5 FAM §423.2-1; 41 C.F.R. §101-11.202-2(b), but they do not require that every thought and every utterance be recorded. Rough drafts and working papers are not records; preliminary notes are not records; uncirculated papers filed as personal are not records. Such documents are not available to other employees unless the author commits them to official files.

Agencies permit employees to keep personal papers in their offices, and to remove them when they retire or change positions. *See* 5 FAM §§432, 417.1; 41 C.F.R. §§101-11.202-2(d), 101-11.401-6(c); A. 204a, 211a, 218a, 227a, 232a. Agencies may discipline employees who fail to keep proper records of their activities; they do not, however, search for records in their employees' desk drawers and private files. Unfiled and uncirculated papers are presumptively private, *see* A. 204a; they may not be inspected by anyone unless constitutional procedures are followed.

In *Porter County Chapter of the Izaak Walton League v. AEC*, 380 F.Supp. 630 (N.D. Ind. 1974) — a case the courts below chose to ignore — the issue was whether notes made by Atomic Energy Commission staff members "[i]n executing their responsibilities relating to the AEC's health and safety and environmental reviews," *id.* at 633, were "agency records" subject to the Act. The court held they were not:

> Such materials are not circulated to nor used by anyone other than the authors, and are discarded or retained at the author's sole discretion for their own individual purposes in their own personal files. The AEC does not in any way consider such documents to be "agency records," nor is there any indication . . . that anyone other than the author exercises any control over such documents.
>
> . . . [T]he Court finds that these materials are personal notes, rather than agency records. Disclosure of such personal documents would invade the privacy of and impede the working habits of individual staff members; it would preclude employees from ever committing any thoughts to writing which the author is unprepared, for whatever reason, to disseminate publicly . . . [T]heir disclosure would be akin to revealing the opinions, advice, recommendations and detailed mental processes of government officials. *Id.*

It is undisputed here that some of the telephone notes contain purely personal conversations having no connection with government business. Other notes, though business-related, reflect personal observations, thoughts, opinions, and beliefs. Many also include expressions of privately held views about politics, personal details concerning third parties, and information relating to Dr. Kissinger's associations with individuals and organizations. A. 245a. This is equally true of statements made by those with whom he spoke. Such matters have no place in public records.[31]

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[31] *Compare United States v. First Trust Co. of St. Paul*, 251 F.2d 686 (8th Cir. 1958), in which the court ruled that notes prepared by Lieutenant William Clark while participating in the Lewis and Clark Expedition were not public records, in part because they contained

> a great many personal and private notations, including information about the receipt of newspapers or letters, details

Dr. Kissinger had no duty to make notes of his telephone conversations. His decision to make and keep such notes was predicated on the belief that they were private papers — a belief which was consistent with the State Department's rules, policies and practices. If the position adopted by the courts below had been the law when he was in office, he either would not have made the notes at all or would have edited and corrected them before they were filed as official records. A. 246a. The retroactive — and unprecedented — decision below that these papers are "agency records" frustrates Dr. Kissinger's legitimate expectations of privacy, just as it threatens the privacy rights of all past and present government employees.

Nothing in the facts of this case justifies any such retroactive restructuring of agency recordkeeping rules. The notes at issue here are not documents the State Department wants for *its* records purposes. These notes are documents the requesters say the Department should have wanted, and should have kept, so *they* could read them under FOIA. This ignores the purpose of records — which is to serve the administrative needs of the organizations that create them —in favor of a form of legal voyeurism that perverts FOIA's legitimate purposes. If tighter recordkeeping rules are needed to capture documentary materials which might otherwise be lost to FOIA claimants, they should be adopted on a prospective basis. This would at least give government employees notice of the new environment in which they are to function, and enable them to take appropriate steps to protect their privacy rights.[32]

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of personal illnesses, social engagements, and other such items as might not be expected to be found in notes of an official character or in an official record. *Id.* at 690.

[32]Whether such regulations would serve the public interest is another question. *See* note 42, *infra*.

The National Study Commission on Records and Documents of Federal Officials has in fact proposed new legislation to declare all documentary materials made or received by federal officials in the course of their official duties to be the records of the agencies where they are employed. *See* National Study Commission, *Final Report*, 3-5 (1977). But the Commission has also recognized that any such legislation should be made prospective to "avoid legal problems . . . and provide notice to Federal Officials as to changes necessary to comply with the recommendations." *Id.* at 8. The Commission's sensible — and sensitive — approach contrasts sharply with the total disregard for privacy rights that is reflected in the decision below.

III. THE DISTRICT COURT'S INSPECTION ORDER IS UNCONSTITUTIONAL.

Although the District Court acknowledged that the notes were "personal in some respects," Pet. App. 58a, it nonetheless directed the State Department to possess and read all of them. None — regardless of content — is to be returned. This procedure is unconstitutional.

Respondents do not deny that the inspection procedures contemplated by the order will involve an invasion of privacy. They simply suggest the intrusion will be "minimal," because public release of the notes can only be made if the "personal privacy" exemption of 5 U.S.C. §552(b)(6) does not apply. *See* Brief for Respondent Reporters Committee for Freedom of the Press, *et al.* in Opposition, 27 (Feb. 5, 1979).

This, however, ignores the nature of the intrusion. The notes contain far more than details about Dr. Kissinger's private life. They also reflect privately-held political views, opinions and beliefs on a variety of subjects, and information relating to Dr. Kissinger's associations with individuals and organizations. This is as true of conversations

in which government business was discussed as it is of purely private conversations. The notes were made and kept in the reasonable expectation that they were non-record materials which would not be part of any official file. The vice of the order is that it retroactively reclassifies the notes as "records" and requires that *all* of them, regardless of content, be read by Executive Branch employees to determine their FOIA status. Giving Dr. Kissinger an opportunity to object to public release of materials otherwise exempt from disclosure under 5 U.S.C. §552(b)(6) does nothing to eliminate the egregious violation of constitutionally protected privacy rights which the inspection process requires.

There is no precedent for this form of search order. The usual rule in civil cases is that a party need deliver only those documents "relevant in purpose" to the inquiry after his own review of the materials. *See v. City of Seattle*, 387 U.S. 541, 544-45 (1967); *In re Horowitz*, 482 F.2d 72, 78 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973). Disputed documents must be reviewed by an impartial judicial officer, not Executive Branch employees.[33] Here, the court has ordered Dr. Kissinger to submit the contents of his private files to Executive Branch review in order to facilitate the private respondents' desire to read them. No court — other than the

[33]The requesters' reliance on *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), as justification for Executive Branch inspection of the notes is plainly misplaced. *Rose* actually confirms the general principle, ignored below, that *in camera* review by an impartial judicial officer — not Executive Branch employees — is required when constitutional privacy rights are at stake. That review must take place *before* the privacy invasion, not afterwards.

courts below — has ever intimated that such extraordinary procedures could be employed for so insubstantial a purpose.[34]

The District Court cited no authority to support the order. However, respondents argued below that this Court's decision in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), could justify seizure and processing of the notes. If *Nixon* was, indeed, the inspiration for the order, we believe the District Court misapplied it.

The far more elaborate[35] procedures at issue in *Nixon* were prescribed by a special statute enacted as an emergency

[34]It is undisputed that the notes include purely personal conversations having no connection with government business. A. 245a; even the requesters concede that such documents cannot be records. *See* Brief for Respondents Reporters Committee for Freedom of the Press, *et al.* In Opposition, 25n.17. Once this concession is made, it follows that the order must be set aside because it contains no constitutionally acceptable method for separating out the privileged materials. The usual procedure is to permit the person claiming the privilege to make the separation, subject to *in camera* review by the court in the event his opponent disagrees with the result. That procedure works well when a clear standard exists for distinguishing privileged from non-privileged materials; here, however, the courts below articulated no standards for distinguishing "agency records" from "personal" and other "non-record" materials. The order thus cannot be reformed to eliminate its constitutional infirmities in the absence of a workable definition of "agency records." Although it may be possible to formulate a definition of "records" in the abstract, *see* 44 U.S.C. §3301, the reality is that agencies decide questions relating to the records status of particular documents on an *ad hoc* basis. We think this is what Congress expected, which is why we conclude elsewhere that FOIA should not be construed as a general charter for judicial review of agency recordkeeping determinations. *See* pp. 21-30, *supra*.

[35]*Compare* Pet. App. 59a-61a, *with* 44 U.S.C. §2107 *note*, §§102-105. *See also* 41 C.F.R. §§105-63.101-303 (procedures for processing the Nixon materials); 42 F.R. 63626-29 (Dec. 16, 1977) (proposed public access rules).

measure to preserve the former President's papers from the imminent threat of destruction. This Court held that the intrusion into privacy which the legislation made necessary did not for that reason invalidate it, but it did so only because archival inspection was the least intrusive means of protecting national interests of overriding importance. 433 U.S. at 451-54. There is no warrant whatever for the assumption that this Court's carefully qualified decision sustaining that legislation authorizes substituting a watered down version of the *Nixon* procedures for the usual rules applicable to claims of privilege in any and all proceedings involving public officials.

The rationale of *Nixon* has no application here. Here, the Government does not claim the documents. Here, no criminal laws are involved. And here, no provision has been made for the return of admittedly private and personal materials. There is no precedent or justification for seizing, searching and retaining any of the notes. The order entered below is supported neither by *Nixon* nor by any other judicial decision. It is unconstitutional and it should be set aside.

IV. THE NOTES MADE OF DR. KISSINGER'S TELEPHONE CONVERSATIONS WHEN HE WAS A PRESIDENTIAL ASSISTANT ARE NOT SUBJECT TO FOIA.

The MAP requesters did not sue for access to the notes made of Dr. Kissinger's telephone conversations when he was Assistant to the President for National Security Affairs because, as their counsel candidly advised the District Court, they recognized that FOIA could not apply to documents generated by Presidential Assistants. A. 266a. The RCFP requesters, cross-petitioners here, were less rigorous in their view of the law; they asked for *all* the notes — including those from the White House period — on the theory that all of them were State Department agency records. The District Court denied that claim, and the

Court of Appeals affirmed. The first and principal reason given for affirmance was that

> [t]he Freedom of Information Act does not extend to those of the President's advisors who are so close to him as to be within the White House rather than the Executive Office of the President (*see* 5 U.S.C. §552(e) (1976); S. Conf. Rep. No. 93-1200, 93d Cong., 2d Sess. 15 (1974); *Nixon v. Sampson*, 389 F.Supp. 107, 145-147 (D.D.C. 1975), *entry of order stayed*, 513 F.2d 430 (D.C. Cir. 1975); *cf. Soucie v. David*, 448 F.2d 1067, 1074-1076 (D.C. Cir. 1971).

Cross-petitioners do not dispute that statement; instead, they argue that

> documents which originated in the White House Office but were later circulated to other agencies in the routine course of government business without any effort by the President to exercise continuing control or maintain their confidentiality . . . should be treated like the records of any other federal agency to which FOIA applies. Cross-Petition in No. 78-1217 (hereafter "Cross-Petition"), 8 (Feb. 5, 1979).

It is unnecessary for this Court to consider whether cross-petitioners' theory is legally sound, because there is no basis for applying it in the circumstances of this case. The notes of Dr. Kissinger's White House conversations were *not* "circulated" to the State Department "in the routine course of government business," *id.*; the Department was *not* "free to use the notes as it saw fit," *id.* at 9; it *never* obtained

"custody" of the notes, *id.* at 10; and it *never* had "control over their use and disposition." *Id.* at 8.

The uncontroverted record evidence shows that when Dr. Kissinger was at the White House he treated the notes as personal papers and kept them in separate personal files; that when he moved to the State Department he relocated these same files to his new office and "continued to [maintain them] in separate personal files during my years at the Department." A. 247a. The record further shows that the notes were never circulated outside Dr. Kissinger's office, and that only he and his immediate aides had access to them. A. 245a-246a. The State Department did not "possess" or "control" these files any more than it would have possessed or controlled them had they been lodged in Dr. Kissinger's basement.[36]

The only connection between the White House notes and the State Department was the fact that these notes once were physically stored there in Dr. Kissinger's personal files. The Court of Appeals correctly concluded that

> [t]he mere relocation of these documents to the State Department *without any indication that they were used by that agency* does not render them State Department records obtainable via an FOIA request to

[36]Cross-petitioners suggest that the failure of the White House to assert continuing control over the notes shows it "surrendered" them to the State Department. Cross-Petition, 7-8, 9. We think the White House's lack of interest in the notes simply confirms Dr. Kissinger's testimony that these papers were "work aids which I could retain or discard as I chose." A. 245a. Moreover, as the opinion of the State Department's Legal Adviser makes clear, the Department did not itself attempt to exercise any control over the notes because it believed they were personal papers which it neither owned nor had the right to possess. A. 84a.

> that department. Pet. App. 50a (emphasis supplied).

Cross-petitioners cannot dispute this finding, for there is *no evidence whatever* that the White House period notes were used by the State Department at any time or for any purpose.[37]

Cross-petitioners also argue that some of the White House period notes might be records of the National Security Council, and that "the portions of the notes relating to Mr. Kissinger's NSC duties fell within the [State] Department's disclosure responsibilities under the FOIA. . . ." Cross-Petition, 13-14. There is no evidence that any of the notes are NSC records.[38] But even if it were assumed that this is the case, cross-petitioners' argument must fail.

First, the argument presupposes that the State Department was the "last agency with physical custody" of the notes. *Id.* at 3. This is not true. The State Department, as

[37]Cross-petitioners assert it is "logical to conclude" that the White House notes were used for a "variety of job-related purposes" after they were relocated to the State Department. Cross-Petition, 9. There is no evidence — none — to support this assertion. Since the sole use made of the notes was to keep Dr. Kissinger's appointment calendar current and to permit his Senior Special Assistant to keep abreast of his daily activities, A. 245a, the only "logical" inference is that the White House notes were not used for any purpose while they were stored at the State Department.

[38]Cross-petitioners speculate that some of the White House notes "necessarily relate to the affairs of the NSC" because of Dr. Kissinger's connection with the Council. Cross-Petition, 11. As Assistant to the President for National Security Affairs, Dr. Kissinger doubtless discussed the "affairs" of many agencies, but this does not mean the notes of such conversations can be characterized as the "records" of the agencies discussed. The Government Organization Manuals to which cross-petitioners refer always list Dr. Kissinger's position with the NSC as "Assistant to the President." A. 268a, 270a, 272a-74a, 276a. Again, there is no basis for inferring that the notes reflect conversations made in any other capacity.

such, had no access to, or custody or control over, any of the documents stored in Dr. Kissinger's personal files. If the White House notes contained NSC records, the last custodian was the NSC, not the State Department. Since the "mere relocation" of the notes did not "change their character," Pet. App. 50a, and cross-petitioners made no FOIA request to the NSC, the Court of Appeals correctly held that "[t]he speculation that some of these earlier transcripts concerned the affairs" of a non-party agency "adds nothing" to cross-petitioners' claim. *Id.*

Second, the NSC theory is inconsistent with the case cross-petitioners submitted for judgment in the District Court. Cross-petitioners' complaint did not allege that the White House notes were NSC records; it alleged that these notes reflected conversations "held by defendant Kissinger during his service as Assistant to the President for National Security Affairs." A. 22a; *see also* A. 29a-30a, 38a, 142a. Although Dr. Kissinger pointed out at the very beginning of the litigation that the papers of Presidential Assistants could not be subject to FOIA,[39] cross-petitioners never moved to amend their pleadings to allege that any of the White House notes were NSC records and never introduced any evidence to show that they were.

The theory of cross-petitioners' summary judgment motion was that the White House notes were State Department records, and that is the theory on which the District Court rendered judgment. The NSC alternative was not seriously advanced until *after* the District Court issued

[39]*See* Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction, 2 *note* (May 2, 1977); Opposition to Plaintiffs' Motion for Summary Judgment and In Support of Defendant Henry A. Kissinger's Cross-Motion for Summary Judgment, 9-10 (June 17, 1977); Reply Memorandum by Defendant Kissinger In Support Of His Cross-Motion for Summary Judgment, 11-13 (Aug. 22, 1977).

its opinion denying cross-petitioners' claim.[40] Cross-petitioners' post decision efforts to change the theory of their motion were properly disregarded by the District Court, and just as properly rejected by the Court of Appeals as "speculation." Pet. App. 50a. There is no reason why this Court should disturb that conclusion.[41]

CONCLUSION

That Dr. Kissinger kept notes of his telephone conversations is not unusual; senior government officials have for decades followed the same practice. Nor is it unusual that the notes were kept in private files; materials of this type have always been treated by the State Department and by other agencies as personal papers which the authors could discard or retain at their discretion.

When Dr. Kissinger left office, he did not simply remove his private files and do with them as he pleased. Instead, he donated his personal papers — including the notes of his telephone conversations — and other documents relating to

[40]The NSC theory was not mentioned in plaintiffs' summary judgment motion and was only hinted at in their response to Dr. Kissinger's cross-motion for summary judgment. It was not seriously advanced until after the District Court issued its Opinion on December 8, 1977. *Compare* Plaintiffs' Reply Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment, 45-46 (Aug. 8, 1977) *with* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Clarification of Opinion, 3 (Dec. 16, 1977).

[41]As a consequence of cross-petitioners' failure to present the NSC theory in an orderly fashion, neither the District Court nor the Court of Appeals had any occasion to consider whether the NSC is an "agency" within the meaning of 5 U.S.C. §552(e). This question is important; it has never been considered by any court. This Court does not ordinarily consider legal issues not decided below. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 163-64.

his years in government to the Library of Congress so that the entire record of his public life would be collected in one place for the convenience of future scholars. The gift was unique in its scope and completeness. It was made openly, with the knowledge and approval of the State Department's principal administrative officers and in scrupulous compliance with its rules and policies.

The requesters candidly admitted below that their reason for instituting this lawsuit was to gain access to what they characterized as an "invaluable" collection of "background materials" on American foreign and domestic policy. That they want access to the notes is perhaps understandable, if short-sighted.[42] But the question here is whether FOIA supports their claim. We think it does not. FOIA applies to "agency records" — not to "background materials" or to personal papers.

The notes now belong to the United States by reason of Dr. Kissinger's voluntary gift to the Library of Congress.

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[42]The decision below, if sustained, is unlikely to enhance the long-range interests of history. As a prominent historian recently said:

> [s]ome of the republic's most precious historical sources have been the diaries . . . of cabinet ministers from Gideon Welles and Salmon P. Chase to Harold Ickes and Henry Wallace — diaries bearing on the discharge of official duties, written on government foolscap or dictated to government secretaries, often no doubt during working hours. The Smith standard, by making these invaluable documents the property of the state, not of the person who, beyond any official requirement, kept them, would thereby insure that they would never have been kept. . . . Surely, it would be better for historians to wait a few years and have this valuable collection than, by insisting on immediate access, discourage all Kissinger's successors from following his example.

Statement of Arthur Schlesinger, Jr., before the Government Information and Individual Rights Subcommittee of the House Committee on Government Operations, 2-4 (March 2, 1978).

They will become publicly available when the privacy interests of Dr. Kissinger and those with whom he spoke no longer require protection, and when the whole historical record of Dr. Kissinger's time in government can be viewed dispassionately. That the notes may contain materials which respondents would like to read — or might profit by reading — provides no reason to twist the law or the Constitution.

The portion of the decision below which is adverse to Dr. Kissinger is wrong in law, wrong in policy, and wrong in result. We ask that it be reversed.

Respectfully submitted,

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